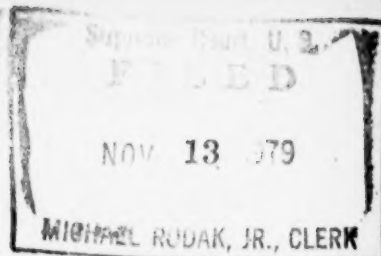


A P P E N D I X



SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 78-1177

WHITE MOUNTAIN APACHE TRIBE, et al.,

Petitioners,

-v.-

ROBERT M. BRACKER, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE ARIZONA
COURT OF APPEALS, DIVISION ONE

Petition for Certiorari Filed
December 29, 1978
Certiorari Granted October 1, 1979

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DOCKET ENTRIES

IN THE ARIZONA SUPERIOR COURT

MARICOPA COUNTY

Cause No. C-256110

Date Description

December 8, 1971 - Complaint.

January 9, 1974 - Deposition of Leland A.
Carpenter

February 1974 - (Exact date not stamped
in Court files) - First Amended
Complaint.

February 15, 1974 - Exhibits "A" & "B"
Which Were Inadvertently Not
Attached to First Amended Complaint
(Schedule of taxes paid under pro-
test).

February 26, 1974 - Answer to First
Amended Complaint (Arizona Highway
Commission and Arizona Highway De-
partment Defendants).

February 26, 1974 - Answer to First
Amended Complaint (Arizona Corpora-
tion Commission Defendants, Governor,
and Attorney General).

March 8, 1974 - Motion for Partial Sum-
mary Judgment (by Arizona Highway
Commission and Arizona Highway De-
partment Defendants).

March 20, 1974 - Response to Defendants'
Motion for Partial Summary Judgment
and Plaintiffs' Motion for Partial
Summary Judgment.

April 1, 1974 - Supplement to Plaintiffs'
Motion for Partial Summary Judgment
(attaching affidavits of Fred
Banashley, Hal Butler, and Bud Mast).

April 1, 1974 - Response to Plaintiffs'
Motion for Partial Summary Judgment
(by Arizona Highway Commission and
Arizona Highway Department Defen-
dants).

April 8, 1974 - Hearing on Cross-Motions
for Partial Summary Judgment.

April 12, 1974 - Response to Motion for
Partial Summary Judgment (by Arizona
Corporation Commission Defendants).

April 6, 1974, May 29, 1974, June 7, 1974,
November 12, 1974, November 19, 1974,
December 26, 1974, January 8, 1975 -
Various supplemental memoranda on
cross-motions for summary judgment.

February 27, 1975 - Further hearing on
Cross-Motions for Partial Summary
Judgment.

May 16, 1975 - Minute entry ruling deny-
ing Plaintiffs' Motion for Partial
Summary Judgment and granting Defen-
dants' Motion for Partial Summary

Judgment "to the effect that the State of Arizona may validly impose its use fuel and motor carrier license taxes against the plaintiff corporation".

May 28, 1975 - Order granting Defendants' Motion for Partial Summary Judgment entered (in conformity with minute entry ruling of May 16, 1975).

July 10, 1975 - Notice of Appeal from Order granting Defendants' Motion for Partial Summary Judgment and Notice of Posting Cash Bond for Costs on Appeal.

July 28, 1975 - Notice of Appeal from Order granting Defendants' Motion for Partial Summary Judgment, and Notice of Posting Cash Bond for Costs on Appeal.

July 29, 1975 - Designation of Contents of Record on Appeal.

July 30, 1975 - Deposition of Hal Butler.

April 9, 1976 - Pretrial Statement.

April 15, 1976 - Trial before the Court without a jury (on remaining state law issue).

May 20, 1976 - Minute entry ruling in favor of defendants and against plaintiffs upon trial of the case.

September 7, 1976 - Stipulation and Order Amending Pretrial Statement nunc

pro tunc.

September 7, 1976 - Judgment entered (in favor of defendants and against plaintiffs).

September 10, 1976 - Notice of Appeal, Waiver of Bond for Costs on Appeal, and Designation of Record on Appeal.

IN THE ARIZONA COURT OF APPEALS

DIVISION ONE

Cause No. 1 CA-CIV 3226

October 12, 1976 - Stipulation and Order consolidating appeals Nos. 1 CA-CIV 3226 and 1 CA-CIV 3619 under the primary number 1 CA-CIV 3226.

January 4, 1977 - Appellants' Opening Brief.

January 21, 1977 - Appellees' Brief.

February 7, 1977 - Stipulation and Order Suspending Appeal (revesting jurisdiction in superior court to allow settlement as between plaintiffs and the Arizona Corporation Commission Defendants and the Governor and the Attorney General).

February 9, 1977 - Letter from Clerk of the Court of Appeals to Clerk of the Superior Court transmitting Stipulation and Order Suspending Appeal.

IN THE ARIZONA SUPERIOR COURT

MARICOPA COUNTY

Cause No. C-256110

March 29, 1977 - Stipulation and Order ordering as follows:

1. Vacating the Judgments of May 28, 1975 and September 7, 1976 insofar as they pertain to the Arizona Corporation Commission Defendants, the Governor, and the Attorney General.

2. Granting said defendants leave to file an amended Answer to the First Amended Complaint.

3. Granting plaintiffs leave to voluntarily dismiss this action without prejudice as against said defendants.

March 3, 1977 - First Amended Answer to First Amended Complaint (by Corporation Commission Defendants, Governor, and Attorney General).

March 29, 1977 - Notice of Partial Voluntary Dismissal Without Prejudice.

IN THE ARIZONA COURT OF APPEALS
DIVISION ONE

Cause No. 1 CA-CIV 3226

April 29, 1977 - Stipulation and Order for Partial Dismissal of Appellees (dismissing appeal as against

Corporation Commission Defendants, Governor, and Attorney General).

March 10, 1978 - Order entered for substitution of parties (substituting successors in office for various appellees).

March 13, 1978 - Oral argument before the Court of Appeals.

June 29, 1978 - Order filing the Opinion of the Court of Appeals and Opinion of the Court of Appeals rendered.

July 14, 1978 - Motion for Rehearing.

July 27, 1978 - Appellees' Response to Motion for Rehearing.

August 28, 1978 - Order denying Motion for Rehearing.

September 6, 1978 - Petition for Review (by the Arizona Supreme Court).

IN THE ARIZONA SUPREME COURT

No. 13962-PR

October 4, 1978 - Order denying Petition for Review.

IN THE SUPREME COURT OF THE UNITED STATES

No. 78-1177

December 29, 1978 - Petition for Writ of Certiorari.

October 1, 1979 - Order granting Petition for Writ of Certiorari, limited to Questions 1, 2 and 5 presented by the Petition.

ARIZONA SUPERIOR COURT
MARICOPA COUNTY

WHITE MOUNTAIN APACHE)	
TRIBE, an Indian tribe)	No. C256110
established pursuant to)	
Executive Order, et al.,)	
)	
Plaintiffs,)	[Filed
)	March 29,
vs.)	1974]
)	
JACK WILLIAMS, Governor of)	
the State of Arizona, et)	
al.,)	
)	
Defendants.)	

AFFIDAVIT

STATE OF ARIZONA)	
)	ss
COUNTY OF NAVAJO)	

HAL BUTLER, being first duly sworn
upon oath, deposes and says:

He is presently the Manager of Fort
Apache Timber Co. (FATCO) and has occu-
pied that post or a similar post since
1963 when FATCO started logging and mill
operations. The initial investment was
the result of loans from the United
States Government and all the operations
were to occur exclusively within the
boundaries of the Fort Apache Indian
Reservation.

The Fort Apache Indian Reservation
has a total area of 1,664,872 acres of
which 720,000 are commercial forest.
Presently there is approximately 300,000
acres of timber being utilized by selec-
tive cutting on a sustained yield basis.
This means that under the supervision of
the United States Forest Service an area
can be recut every 20 years without de-
stroying the forest or damaging the
watershed, an important factor, since the
reservation supplies about 35% of the
water to the densely populated center
portion of Arizona.

FATCO is wholly owned by the White
Mountain Apache Tribe. All profits be-
long to the Tribe, but accumulated pro-
fits cannot be distributed until the ob-
ligations to the United States Government
have been satisfied in full. After
these obligations have been paid, however,
all profits will be available to the
Tribe for either re-investment, or health,
education and welfare programs.

Presently, FATCO employees approxi-
mately 300 Indians in various phases of
its operation. An additional 50 to 100
Indians are employed by the six companies
FATCO has contracted with to perform the
logging and hauling of timber. Pinetop
Logging Company, as one of these loggers,

employs at least 50 tribal members in its operations.

Although FATCO is a wholly owned enterprise of the Tribe, the Tribe realizes present income from FATCO's operations by the receipt of stumpage payments for the timber processed. As was stated above, further benefits are realized by the Tribe through FATCO profits, although as explained earlier, these profits cannot be distributed by FATCO before the obligations to the U. S. Government have been satisfied.

The lumbering operations could be outlined as follows:

- I. Trees are marked by the BIA Forestry Dept.
- II. We fall the trees, they are cut to proper size, skidded, and decked.
- III. Logs are loaded onto trucks and transported to our mill.
- IV. A log is classified as either pulp wood or a saw log and are manufactured accordingly. Approximately 60% of the timber coming to the mill is pulp wood (except for Cibique operation).

Operations II and III above are performed entirely by contractors such as Pinetop Logging. Step IV and the selling of lumber is performed by FATCO.

The responsibilities and duties of FATCO and the loggers are enumerated in contracts with the White Mountain Apache Tribe containing provisions prescribed by the Bureau of Indian Affairs. Many of FATCO's responsibilities have been passed on to loggers, such as Pinetop, through separate contracts.

An example of these responsibilities is the provision, contained in all the contracts, requiring that the logger should maintain all roads in proportion to its share of use. More specifically all the contracts provide that during any periods in which a logger or FATCO uses existing Reservation roads, they shall maintain such roads in proportion to its share of use, as determined by agreement between FATCO and the BIA Superintendent. In the even there is a disagreement, the final determination is made by the Superintendent.

The Superintendent polices the activities of FATCO and the loggers, and dictates when repairs on roads and other reservation improvements shall be made. By contract, FATCO and the loggers are given permission to use existing reservation improvements, such as roads, subject to applicable regulations promulgated by BIA and such other conditions as the Superintendent may impose.

FATCO and the loggers have, over the past ten years, expended substantial amounts each year to maintain Tribal and BIA roads as required by the Superintendent. Pinetop, for example, has separate personnel and equipment dedicated solely to road maintenance.

Pinetop is paid for delivered product. Only part of its gross receipts are the result of receipts due to hauling. Only a small portion of the hauling is done on Arizona STATE Highways. A high percentage of Pinetop's receipts from hauling is expended to construct new roads and maintain existing Tribal and BIA roads as required by the Superintendent.

One of the principal factors considered by both Pinetop and FATCO in negotiating a contract price for logging operations was the costs to be incurred by Pinetop in carrying out that operation. At the time we agreed on a price in 1971 it was not believed the State could impose use fuel and motor carrier tax on Pinetop since it would be, in effect, a tax on the Tribe. Subsequent to the States attempt to levy the tax, FATCO has agreed to bear the burden of such taxes instead of losing Pinetop as a contractor.

There are presently six contractors working for FATCO, and FATCO will have to

pay any taxes imposed on those contractors through higher costs for logging. This may force us to do our own logging.

The tribe has attempted its own logging operations at its small saw mill in Cibique, however, it has proven to be uneconomical and we will be forced to change that operation.

DATED this 22 day of March, 1974.

/s/ Hal Butler

(Jurat omitted in printing)

AFFIDAVIT

STATE OF ARIZONA)
) ss
COUNTY OF NAVAJO)

BUD MAST, being first duly sworn upon oath, deposes and says:

That he is the head forester in charge of the Forestry Dept. of the Bureau of Indian Affairs. That in said position he supervises the marking, cutting and hauling of timber by FATCO and its contractors on the Fort Apache Indian Reservation.

Through contractual agreements the Forestry Dept. controls and determines which and how much timber will be cut by FATCO and its contractors. The Forestry

Dept. also determines where and when roads will be built by FATCO and its contractors such as Pinetop.

Also the Forestry Dept., through the Superintendent of the Bureau of Indian Affairs, has the power to, and does, dictate to both FATCO and its contractors to make repairs to and maintain existing BIA and Tribal roads.

Both FATCO and its contractors have all agreed by written contract to repair existing improvements on the reservation according to their use of those improvements. Improvements include roads and the Superintendent has the authority to order either FATCO or any of its contractors to maintain or repair any of the roads used by them. The contractor's only recourse is to the Area Director of the BIA if he is aggrieved by any decision of the Superintendent.

Only a small percentage of a loggers travel is done over Arizona State Highways. In theory the State is supposed to maintain its own roads, but some of that maintenance is done by the BIA or the Tribe. The State of Arizona contributes absolutely nothing to the maintenance or repair of Tribal or BIA roads. No State men, equipment or money have, to my knowledge, ever been expended or utilized on BIA or Tribal roads.

Very extensive rules and regulations have been promulgated by the BIA encompassing all aspects of forest utilization and management, including extensive rules and regulations governing in detail the planning, engineering, construction, maintenance and general regulation of all roads used by loggers. Aspects not covered specifically by the Federal Regulations have been covered through contracts with the logging companies. The provisions in those contracts are proscribed by the BIA and all of the contracts must be approved by the BIA. Through contracts the logging companies are forced to expend substantial funds each year to construct, maintain, and repair BIA and tribal roads used by them in their logging operations.

DATED this 26th day of March, 1974.

/s/ Bud Mast

(Jurat omitted in printing)

AFFIDAVIT

STATE OF ARIZONA)
) ss
COUNTY OF NAVAJO)

FRED BANASHLEY, being first duly sworn upon oath, deposes and says:

That he is the Chairman of the White Mountain Apache Tribal Council, which,

under the Tribes Constitution is the governing body of the Tribe.

That the Tribal Council has the power under its constitution to levy and collect taxes and to impose license fees, subject to review and approval by the Secretary of the Interior, upon members and non-members doing business within the boundaries of the Fort Apache Indian Reservation.

In the past the Council has not and still sees no reason to levy taxes or license fees on contractors such as Pinetop. Any such tax would only fall directly on the Tribe through higher logging costs and would in effect be a tax on ourselves since all of the profits made by FATCO are the property of the Tribe.

FATCO's operations are extremely important to the entire White Mountain Apache Tribe. Besides providing employment for some 300 tribal members and stumpage payments providing yearly income for the Tribe, the Company showed a net profit for 1973 of \$1,508,713 when all of the Tribal Enterprises together showed a profit of only \$1,667,091.

The profits earned by FATCO must be accumulated and cannot be distributed to the Tribe until the full amount of obligations due the United States Government

have been paid. The Tribe presently relies on stumpage payments from FATCO for its yearly existence. For example, for the year 1973 the total budgeted income for the total tribe was \$1,522,107, included in that sum is FATCO's stumpage payment of \$1,150,000 plus forestry fees in the amount of \$110,940. For the year 1972 total income budgeted was \$1,404,817, budgeted to be received from stumpage payments from FATCO was \$1,150,000. It can easily be seen how important FATCO and the timber industry is to the 6500 tribal members. All of FATCO's operations are carried on exclusively within the boundaries of our reservation. No funds or aid of any kind has been received by the Tribe from the State of Arizona for construction, maintenance, or repair of any BIA or Tribal roads.

DATED this 25th day of March, 1974.

/s/ Fred Banashley

(Jurat omitted in printing)

ARIZONA SUPERIOR COURT, MARICOPA COUNTY

EXHIBIT A TO [DEFENDANTS'] MOTION FOR
PARTIAL SUMMARY JUDGMENT

[Filed March 7, 1974]

* * * *

13(a) THE CONTRACTOR and his sub-contractor(s), hereinafter called CONTRACTOR shall at all times during the life of this contract, carry and maintain liability insurance under the Workman's Compensation Law and under the Occupational Liability Disease Law of the State of Arizona. The CONTRACTOR shall comply with all provisions of the Federal Wage and Hour Law and shall make all payments due or to become due under the Federal and State Social Security Laws under the Unemployment Compensation Law, tax laws, or any other laws now in effect or that may be enacted hereafter, affecting the employees of the CONTRACTOR, and the products, materials and equipment belonging to or under the control of the CONTRACTOR. The CONTRACTOR further agrees to furnish the COMPANY, on demand, receipted bills or other satisfactory proof showing that the payments required under the said Social Security, Unemployment Compensation and tax laws have been made as and when due throughout the life of this contract.